IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 73

ARMOUR AND COMPANY,

Petitioner,

vs.

ADAM WANTOCK and FRANK SMITH,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER, ARMOUR AND COMPANY.

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Dated at Chicago, October 10, 1944.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

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Now comes the appellant and tenders its reply to the brief of appellees herein. This reply is divided into three sections as follows:

1. The appellees request affirmative relief upon an issue not before this Court.
2. Appellees have begged the question in their discussion of primary coverage under the Act.
3. Appellees show no authority where the factual situation was like, or even similar to, that presented here.

We shall discuss these points in the order named.

1. Appellants request a reversal of a judgment of the District Court on a point on which no appeal was taken to the Circuit Court nor from the Circuit Court to this Court, by any party to the proceeding.

Appellees, on pages 12-13 of their brief, request for the first time since the decision of the District Court, that the decision of the District Court (that time during which these employees were sleeping in the fire hall was not time "employed" within the meaning of the Act) be reversed.

Appellees did not appeal any portion of the District Court's order. The decision of the Circuit Court, on appeal, has this to say on this subject (emphasis supplied):

> "The correctness of the District Court's holding that time devoted to sleeping and eating should not be counted as part of overtime, is *not before us*. The employees have *not appealed* from that part of the judgment, which is adverse to them."

We do not think the propriety of the action taken on this question, by either Court below, is before this Court.

From the very beginning, appellees have never claimed that time spent in eating meals should be included in the compensable time for which appellees should be paid (R. 9). Sleeping and eating are required whether a person is employed or not. They are functions essential to living regardless of employment or idleness. Even if the question were before the Court this first request of appellees for reversal of the District Court is without merit.

2. Appellees have begged the question in their discussion of the issue of primary coverage under the Act.

If we have correctly understood appellees' brief, counsel seems to have hopelessly confused the two basic questions involved in this case. Arguments are advanced in that section of the brief entitled "Plaintiffs are covered by the Act," which are relevant only in connection with the second question, "If covered were they employed while playing checkers or sleeping at their own option."

We have *not* claimed "that employees must engage in manual labor in order to be covered by the Act," as counsel asserts we have (p. 8). We have asserted, but *not* in connection with the question of primary coverage, that employees must be required, suffered, or permitted to *work* (as this Court defined work in *Tennessee Coal I. & R. Co.* v. *Muscoda Local No. 123*), before their time could be charged to the employer as compensable time. We have also asserted that they engaged in some *occupation* which is essential, and indispensable to the production of goods for commerce, before they are covered by the Act. But we have not attempted to substitute "manual work" for "occupation." We have attempted to admit that an employee if charged with a continuing responsibility may spend his entire shift sitting in a chair, and still be covered by the Act. Conversely, we have urged that mere sitting in a chair, does not *necessarily* constitute "employment" or "work" even if an employee is covered by the Act.

We think counsel's confusion as illustrated by his effort, under the head of basic coverage, to distinguish this case from the *Skidmore* case in which *no question*

of basic coverage was involved. In fact no such question could be involved in that case as to most of the employees since it was conceded that they were regular production employees during their regular working shift each day. The sole question, as we comprehend it, was whether their working hours continued on into the hours spent at recreational pastime and in sleep, in the fire hall, after their production work was done for the day.

Nor can we understand counsel's discussion (p. 8) of the statutory definition of "employ" in that section of his brief devoted to the question of basic coverage. We have not intentionally mentioned this definition of "employ" in connection with the question of primary coverage. We have mentioned it in discussing the second question of whether "employment" included a period of time when the employer required nothing, suffered nothing or permitted nothing,—a period when the employee alone elected how he should apply his time.

The arguments advanced on the first page and one-half of appellee's argument entitled "The plaintiffs are covered by the Act" are therefore entirely irrelevant to that question. Those arguments apply, if at all, to the second title of the brief, *viz.*, "The plaintiffs were employed within the meaning of the Act."

The remaining portion of the brief involving the question of basic coverage is devoted to the contention that watchmen, having a continuing responsibility throughout their entire shift, are covered by the Act. This we admit. But nowhere has counsel explained away these undisputed facts:

1. These plaintiffs are *not* watchmen, and have none of the responsibilities of the watchmen for continuously protecting the property. Their service lies beyond the perimeter of the service involved

in *Kirschbaum* v. *Walling*, 316 U.S. 517; or in *Walton* v. *Southern Package Corp.*, 320 U.S. 540.

2. This Court is faced with the necessity of finding that the services of these employees are "necessary," "essential," "indispensable" to the production of soap for commerce in the face of undisputed evidence that soap *is* produced for commerce in a score or more of the largest soap plants in the country, those of Procter and Gamble, Lever Brothers, Colgate Palmolive-Peet and in the other soap factory of the appellant, without the employment of any employees such as appellees.

There are certain errors in the argument advanced in this section of appellees' brief which, while wholly immaterial to the question of primary coverage, may have some bearing in connection with the second question involved here. Although not properly under this heading, we will follow counsel's error and make those corrections here.

It is stated that the employees involved in the *Skidmore* case received separate payments, one part being in consideration for the production work done during the day, the other for their attendance in the fire hall at night. This is not correct. Never did the employee in the *Skidmore* case receive one cent of compensation for his time in the fire hall. On occasions he was paid for time spent away from the hall responding to a fire call from the watchman. If there was *no fire call* on a given night, there was *no pay*, beyond what the employee earned at his regular production job during the day. The Circuit Court said:

> "On these nights they were not required to perform any tasks except to answer alarms, for which they received extra pay." (*Skidmore* v. *Swift*, 136 F. 2nd 112 at 113.)

The parallel here is found in the manner of computing compensable time. When one of appellees answered a call, he was credited, as compensable time, with the time elapsed after his departure from the fire hall and until his return, when all his responsibility ended.

Counsel chooses, for the first time, to assume that the Company's maintenance of quarters for appellees in the fire hall constituted a part of their total compensation. No such claim was made in any court below. If the Court now takes the claim seriously the entire amount of the judgment entered must be recalculated, as the employer has received no credit of any sort for the fair value of such compensation. This for the reason that the sole wage claimed of record was the weekly wage (R. 10).

3. Counsel has shown no authority based upon similar facts, justifying the conclusion that appellees were "employed" i.e. (required, or suffered, or permitted to work) while engaged at whatever recreation or occupation they elected.

The three cases cited by counsel involving classification of idle time as compensable time, factually are neither parallel nor similar.

In *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local No. 123,* 88 L. ed. 610, this court, without specifically so stating, adopted the same construction of compensable time, under this Act, as the Administrator of the Act had adopted from the beginning. This court said (emphasis supplied):

> "Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or

overtime compensation for all *actual work* or employment."

* * *

"We cannot assume that Congress here was referring to *work* or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required* by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

Contrasting this definition with the official interpretation of the Administrator of the Act, and we find this court's language constitutes a brief summary of the Administrator's interpretation which says (emphasis supplied):

"6. In a few occupations *periods of inactivity* need not be considered as hours worked, even though the employee is subject to call. The answer will generally depend upon the *degree to which the employee is free to engage in personal activities during periods of idleness* when he is subject to call and the *number of consecutive hours that the employee is subject to call without being required to perform active work,—i.e.*, the *frequency* * with which the employee is called upon to engage in work. In these cases, the nature of the employee's work involves *long periods of inactivity* which the employee may use for *uninterrupted sleep*, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating at switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the

* In the case at bar this has been shown to be one call, averaging forty-five minutes in duration, once each calendar month.

switchboard and is able to get *several hours of uninterrupted sleep* every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer *only a few calls* between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified."

"7. In some cases employees are engaged in active work for part of the day but *because of the nature* of the job are also required to *be on call for 24 hours a day*. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at *any* time during the day or night) the pumper must start it again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee *makes his home at his employer's place of business* in these cases does *not* mean that the employee is necessarily *working* 24 hours a day. In the ordinary course of events the employee has a *normal night's sleep, has ample time in which to eat his meals,* and has a *certain amount of time for relaxation and entirely private pursuits.* In *some* cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is *not working at all times during which he is subject to call in the event of an emergency,* and a reasonable computation of working hours in this situation will be accepted by the Division." (*Interpretative Bulletin No. 13*, Wage and Hour Administrator, paragraphs 6 and 7.)

With this concept in mind a brief study of the factual underpinning of the three cases cited by counsel reveals not only a striking factual difference, but an equally striking difference in the *degree of responsibility assumed* during the idle time under consideration.

Counsel refers to the decision of this Court in *Overstreet v. North Shore Corporation*, 318 U.S. 125, and argues that under appellant's theory the only time allowed the bridge tender as compensable time would be the time spent in pulling levers and turning switches necessary to the actual raising and lowering of the bridge.

We waive the point that the "sole question"* involved in that case was the basic coverage of the three employees involved, for the facts of the case provide a striking contrast as to the *responsibilities of the employees* during the periods of so-called idle (from the standpoint of manual effort) time involved.

An editorial note appended to the District Court's decision of this case, in 4 Labor Cases, 60, 736, reports the facts surrounding the so-called "idle time" of the employees there involved (emphasis supplied):

> "* * * the road is *extensively* used by vehicular traffic from points outside of Florida to points on the toll road and beyond and by vehicular traffic from points on the toll road and beyond to points outside the State of Florida for hire. * * *; that on Fort George Island there are located two large clubs whose memberships mostly consist of people from States other than the State of Florida, who used the road in interstate commerce for hire; that

* "The sole question for decision is whether these employees are engaged in commerce within the meaning of Sections VI and VII of the Fair Labor Standards Act, 29 U.S.C.A." (*Overstreet et al v. North Shore Corp.*, 128 Fed. 2nd 450.)

there is a large winter colony on Fort George Island whose residents come from States other than Florida who use the toll road for hire in interstate commerce; that on the road and accessible by land only over the road are located several fishing camps renting boats, cabins and serving meals that are frequented by the public and used extensively by visitors from Georgia, South Carolina and other nearby states who used the road in interstate commerce for hire; that mail and parcels from other states are delivered to residents and visitors along said road; that the U. S. Post Office Department uses the road for mail delivery; that the *inter*-coastal waterway is *constantly used* in interstate commerce by pleasure craft and freight vessels, the draw-bridge being *constantly raised and lowered to permit the passage of such boats,* which are engaged in interstate commerce; that supplies are delivered to such boats at the drawbridge over Sister's Creek by use of the road; that passengers are picked up and discharged at the same place and use the road; that on the road are several retail stores and stands purchasing commodities which have moved in interstate commerce for resale to the public, which commodities are delivered to them over the road and move over the road in their original packages."

Contrasted with this "constant" raising and lowering of the bridge, the employees here involved were called upon to perform some service during idle time *once each calendar month*, and then for an average period of *forty-five minutes*. Thus the great difference in the proportion of idle time expended in actual performance of actual duties is entirely different in the two cases.

But this is not the primary point of distinction. If we assume that the draw-bridge tender was also required to raise the bridge on the average of but once

each calendar month; and assume that the operation also required but forty-five minutes of his time, we bring the cases to an even basis as far as manual effort is concerned. But during all the remaining time, the draw-bridge tender was required to be *constantly on watch to detect the approach* of vessels during his entire period on duty.

The employees involved here had *no such responsibility*. The primary responsibility for watching the premises and detecting the fire, was the responsibility of another employee, the watchman. These employees were not even *permitted* to enter the portion of the plant where fires might occur unless and until this watchman called them. They had no continuing responsibility of any kind, such as the bridge-tender had.

To bring the facts in the *Overstreet* case to similarity with this case, it would be necessary to add to the facts existing in the *Overstreet* case, facts such as these:

The bridge-tender contracted to make his home near the bridge. Some other employee was hired to watch the river, and detect the approach of ships necessitating the operation of the bridge. When a ship approached, the bridge-tender left his garden hoeing; his radio program, or whatever personal activity he had chosen to engage in; came to the bridge, raised and lowered it, after which he returned to such personal occupation as he pleased.

Conversely, in order to bring this case to a common factual basis with the *Overstreet* case, we must charge these employees, aside from their present duties, with the basic and continuing responsibility of keeping a section of the plant under continuing observation, and of detecting the start of a fire. Under the facts here, that continuing responsibility was not the re-

sponsibility of these employees. It was a responsibility assumed entirely by the watchman who is not involved here.

The decision of the District Court in *Travis* v. *Ray*, 41 Fed. Sup. 6, presents the identical factual difference. The plaintiff employee there was a bus driver. His day's work included "lay-overs" at various termini of his run during which he performed no manual labor. But he did assume a continuing responsibility during those "lay over" hours. There was no station house or station agent or other company employee present during these lay over hours. During that time this driver was responsible for the safety of the bus. It was his duty to watch for and care for passengers who were using the bus as a waiting room following the arrival, and prior to the departure of the bus.

We are not able to ascertain the facts underlying the decision of the District Court in *Walling* v. *Allied Messenger Service*, 47 Fed. Supp. 773. Suffice it to say that the primary question involved in that case was one of primary coverage, and of whether the "service establishment" exemption was involved. We cannot determine the facts upon which the District Court included the time spent by the messengers between trips as compensable time. However, experience indicates that the ordinary messenger does not sit idle in his employer's office save for one forty-five minute period every calendar month.

CONCLUSION.

The decision of this Court in the *Kirschbaum* and *Walton* cases established an outer perimeter of coverage of the Act. The services of these appellees is clearly

beyond, and one step further removed from the process of "production of goods for commerce" than were the watchmen involved in those cases. We think the watchmen cases describe the maximum coverage of the Act and that employees like appellees, who are shown in scores of plants *not* to be essential or indispensable to production, are not covered by the Act.

Even if covered, the contract of appellees covered two elements. One element was what they should *do*. The other was *where they had agreed to live*, at certain times. Nothing in the Act applies to a contract affecting only an employee's place of residence.

Respectfully submitted,

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